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No. 84, Original

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

UNITED STATES OF AMERICA,
Plaintiff
v.
STATE OF ALASKA

ON THE REPORT OF THE SPECIAL MASTER

REPLY BRIEF FOR THE STATE OF ALASKA

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INTRODUCTION

In November of 1957, the Bureau of Sport Fisheries and Wildlife in the Interior Department applied for the withdrawal and reservation as a wildlife refuge of almost 9 million acres in northeastern Alaska. Report of the Special Master ("Report") at 447-50 and n.4. Although filed before Alaska's admission to the Union on January 3, 1959, the application was not acted on until December of 1960, nearly two years after Alaska statehood. *Id.* at 449. The United States contends that the lands applied for included vast areas of tide and submerged lands, and that the mere act of applying for their withdrawal deprived Alaska of its entitlement to these submerged lands under both the constitutional equal footing doctrine and the Submerged

Lands Act, ch. 65, 67 Stat. 29 (1953) (codified as amended at 43 U.S.C. §§ 1301 *et seq.* (1988)) Exception of the United States and Brief for the United States in Support of Exception ("United States' Brief") at 31-53.

Alaska opposes the United States' exception on four grounds: (1) the application did not defeat Alaska's submerged lands entitlement under the constitutional equal footing doctrine; (2) the application did not defeat Alaska's submerged lands entitlement under the Submerged Lands Act; (3) Congress could not condition Alaska's admission to the Union on a relinquishment by the State of its submerged lands entitlement under the equal footing doctrine; and (4) in any event, Alaska's rights under the equal footing doctrine were defeated only to the minimum extent necessary to fulfill the purpose of the withdrawal.

The most troubling aspect of the United States' submission is its cavalier attitude toward Alaska's sovereign rights and, by extension, those of all other States. State ownership of lands underlying navigable waters within State boundaries is "an inseparable attribute of the equal sovereignty guaranteed to it on admission" to .the Union. *United States v. Louisiana*, 363 U.S. 1, 16 (1960). The original thirteen States succeeded to the British Crown's sovereign title to such lands at the time of the Revolution. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842). Title to such lands vests in subsequently-admitted States upon admission to ensure that they join the Union on an "equal footing" with the original thirteen. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 229-30 (1845).

To implement this equal footing doctrine, the United States holds such lands in a territory "in trust" for future States created out of that territory. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 196 (1987) (quoting *Pollard*,

44 U.S. (3 How.) at 230). "[U]pon the admission of a state to the Union, the title of the United States to lands underlying navigable waters within the state passes to it, as incident to the transfer to the State of local sovereignty," *United States v. Oregon*, 295 U.S. 1, 14 (1935). Such title is "automatically vested," *Arizona v. California*, 373 U.S. 546, 597 (1963), and "is conferred not by Congress but by the Constitution itself." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977). While Congress has the power to defeat a new State's title to such lands by conveying them to a third party prior to statehood, it has never provided for disposal of submerged lands under the general public land laws; it will do so *only* in "exceptional instances when impelled . . . by some international duty or public exigency." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). Accordingly, there is a "strong presumption" against defeat of a new State's title which will not be inferred "unless the intention was definitely declared or otherwise made plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land under the waters of the stream." *Montana v. United States*, 450 U.S. 544, 552 (1981) (quotations and citations omitted).

The Court has never held that a pre-statehood federal reservation (as distinct from a conveyance to a third party) can defeat State title under the equal footing doctrine, *Utah*, 482 U.S. at 200, much less that a mere application not acted on until long after statehood could have that effect. Assuming *arguendo* that it could, however, the United States first must show (a) that Congress clearly intended to include submerged lands in the reservation, and (b) that Congress affirmatively intended to defeat the future State's title to the lands. *Id.* at 202.

The United States concedes that some of the lands at issue under its exception -- tidelands and lands underlying inland navigable waters[1] -- are subject to the equal footing doctrine. United States' Brief at 51-53. The United States nonetheless relies on *United States v. California*, 332 U.S. 19 (1947) (the "1947 *California* decision"), which held that the equal footing doctrine does not extend offshore and the United States, not the individual States, had "paramount rights" to offshore submerged lands. United States' Brief at 31-33. From this, it argues that there is as strong a presumption in favor of continued federal ownership of such lands as there is

[1] As shown on the Master's Figures 9.1 and 9.2, Report facing p. 450, several of the disputed areas are juridical bays under Article 7 of the Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 15 U.S.T. (pt. 2) 1607, T.I.A.S. No. 5639, which the Court has adopted for Submerged Lands Act purposes. *United States v. California*, 381 U.S. 139, 161-67 (1965). On Figure 9.1, these areas at minimum include the inlet enclosed by Brownlow Point, the inlet enclosed by Konganevik Point, and Simpson Cove. On Figure 9.2, these areas at minimum include Arey Lagoon, Kaktovik Lagoon, Pokok Bay, Angoon Lagoon, Egaksrak Lagoon, and Demarcation Bay. All of the disputed lands, moreover, underlie a series of coastal lagoons enclosed by near-shore barrier islands separated by very narrow entrances all of which are less than ten miles across. *See* the Master's Figures 9.1 and 9.2, Report facing p. 450, and Report at 138-39 (all of the waters enclosed by the islands are within three miles of land and none of the closing lines is long enough to add any area to the three-mile belt). All of the lagoons accordingly are inland waters under the 10-mile rule that this Court found was the United States' policy from at least 1903 until 1961:

> Prior to its ratification of the Convention on March 24, 1961, the United States had adopted a policy of enclosing as inland waters those areas between the mainland and off-lying islands that were so closely grouped that no entrance exceeded 10 geographical miles. This 10-mile rule represented the publicly stated policy of the United States at least since the time of the Alaska Boundary Arbitration in 1903.

United States v. Louisiana (Alabama and Mississippi Boundary Case), 470 U.S. 93, 106-07 (1985) (footnotes omitted). *See* Exceptions of the State of Alaska and Supporting Brief ("Alaska's Brief") at 7-43.

in favor of the States for lands subject to the equal footing doctrine. *Id.* at 33-34. It concedes that Congress, in the Submerged Lands Act, granted to the coastal States the offshore submerged lands within their boundaries. United States' Brief at 34-35. It claims, however, that the submerged lands at issue here fall within a statutory exception to Alaska's Submerged Lands Act grant[2] for lands "expressly retained" by the United States at statehood. *Id.* at 39, citing section 5(a) of the Act, 43 U.S.C. § 1313(a). In its view, the application at issue here designated the disputed lands as "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife" for purposes of section 6(e) of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339, 340-41 (1958) (reprinted as amended in 48 U.S.C. note preceding § 21 (1987)), and section 6(e) in turn "expressly retained" the lands at the time of statehood within the meaning of section 5(a) of the Submerged Lands Act. United States' Brief at 39. To the extent there may be doubt that the lands were "expressly retained," the United States contends that such doubts must be resolved in favor of the United States. *Id.* at 36 and 39. Finally, the United States submits that, if it prevails on this statutory argument as to Submerged Lands Act lands, it also should prevail as to equal footing doctrine lands.[3] *Id.* at 51-53.

[2] Congress made the Submerged Lands Act applicable to Alaska in section 6(m) of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339, 343.

[3] The United States' discussion of this last point is so cursory, however, that it should be deemed waived. *Cf.* Supreme Court Rules 24.1(i) (a brief for a petitioner or an appellant must contain "[t]he argument, *exhibiting clearly the points of fact and of law presented and citing the authorities and statutes relied on*" (emphasis added)), 24.2 (a brief for a respondent or an appellee "shall conform" to the same requirement), and 24.4 (a reply brief shall conform to the same requirement).

The United States is wrong on all counts. More fundamentally, however, the United States seeks to rewrite the law in a manner at odds with the decisions of this Court establishing and applying the equal footing doctrine, contrary to the intent of Congress underlying the Submerged Lands Act, and in violation of Alaska's constitutional right to admission to the Union on an equal footing with its sister States. In part I below, Alaska shows that the pre-statehood actions on which the United States relies did not defeat Alaska's submerged lands entitlement under the equal footing doctrine. In part II.A, Alaska demonstrates that Congress intended the Submerged Lands Act both to extend the equal footing doctrine offshore and confirm it as to tidelands and lands underlying inland navigable waters, so the same analysis must apply to both equal footing doctrine lands and offshore submerged lands within State boundaries. Part II.B establishes that the United States' statutory argument in any event fails on its own terms. In part III, Alaska explains that Congress could not condition Alaska's admission to the Union on the State's relinquishment of its submerged lands entitlement under the equal footing doctrine. Part IV shows that, to the extent any pre-statehood federal action defeated Alaska's title, it should in all events be limited to the minimum necessary to protect the interest claimed by the United States with all remaining incidents of ownership passing to Alaska.

SUMMARY OF ARGUMENT

I. This Court's equal footing doctrine decisions establish a number of stringent criteria for finding that a pre-statehood federal action has defeated a State's title to lands underlying navigable waters. The application at issue here meets none of these criteria.

A. Congress will defeat a State's equal footing doctrine title only in "exceptional instances when impelled to particular disposals by some international duty or public exigency." *Holt State Bank*, 270 U.S. at 55. The filing of an application, however, did not reflect the existence of such exceptional instances. Applications could be filed by virtually any federal, State, territorial, or municipal official. Once filed, the application would be reviewed to determine whether it should be granted. During the pendency of the review, there was no change in the way in lands were administered. This proves that, until a final decision on the application was made, there could be no exceptional instance supporting a congressional determination to deviate from its consistent policy of holding lands under navigable waters for the benefit of future States.

B. The application for withdrawal at issue here did not include submerged lands. The Court has established a presumption against the inclusion of lands underlying navigable waters in pre-statehood federal disposals or withdrawals and reservations, and the United States must "establish that Congress clearly intended to include land under navigable waters within the federal reservation." *Utah*, 482 U.S. at 202.

The application and the notice of it given to the public stated that the intent was to withdraw the applied for lands from "all forms of appropriation under the public land laws" except mineral leasing and mining locations. *See* Report at 447 n.1 (application) and 448 n.2 (public notice). Tidal and submerged lands were not available for appropriation under the public land laws, however, and this is evidence that they were included among the applied for lands. *Utah*, 482 U.S. at 203-04.

The boundary description of the applied for lands followed the "line of extreme low water." *See* Report at 449 n.2. Thus,

by its own terms, it excluded the lands underlying the lagoons below the line of extreme low water. This is especially true because the United States in several contemporaneous actions wrote boundary descriptions that explicitly included *all* areas underlying lagoons within their exterior boundaries.

While there are tidelands within the exterior boundaries of the applied for lands, that fact is not sufficient to overcome the presumption in favor of State title, particularly when there is no express reference to those lands as here. *Montana*, 450 U.S. at 554. In contemporaneous actions in Alaska, moreover, the United States expressly mentioned tidelands when it intended to include them in pre-statehood actions.

C. The United States must show that Congress affirmatively intended to defeat Alaska's title to equal footing doctrine lands, *Utah*, 482 U.S. at 202, and it has not. In fact, the legislative history of the Alaska Statehood Act reveals the Congress did *not* intend to defeat Alaska's equal footing doctrine title. Instead, Congress affirmatively intended that Alaska receive title under the equal footing doctrine to *all* lands underlying navigable waters within its boundaries at statehood.

II. The application did not defeat Alaska's submerged lands entitlement under the Submerged Lands Act.

A. The principles the Court established in the equal footing doctrine cases apply equally to offshore submerged lands not subject to the doctrine. The legislative history of the Submerged Lands Act reveals two congressional purposes.

First, Congress intended to rewrite the law for the future as it had been believed to be prior to this Court's 1947 *California* decision and *apply* the *Pollard* equal footing doctrine rule of State ownership to offshore submerged lands within State boundaries. Congress's second purpose was to prevent any further erosion of the States' submerged land rights by this

Court.

To implement this congressional intent, the Court must apply the same presumption in favor of State title to offshore submerged lands under the Submerged Lands Act as it applies to equal footing doctrine lands. As the United States relies on an exception to the Submerged Lands Act, the burden must fall on it to show that it comes within the exception and any doubts must be resolved in favor of Alaska. That exception, for lands "*expressly* retained" by the United States at statehood, 43 U.S.C. § 1313(a) (emphasis added), requires the United States to show affirmatively that Congress intended to prevent the transfer of the disputed lands to Alaska.

B. The application did not defeat Alaska's submerged lands entitlement under the Submerged Lands Act even under the United States' statutory analysis.

The United States claims that section 6(e) of the Alaska Statehood Act "expressly retained" the applied for lands for purposes of the Submerged Lands Act exception. This mischaracterizes the nature and the legal effect of the application, the function and purpose of section 6(e) of the Alaska Statehood Act, and the language and intent of the Submerged Lands Act exception.

Section 6(e) of the Alaska Statehood Act transferred certain property used for fish and wildlife management to the new State which, following statehood, would take over that traditional State responsibility from the federal government. Lands "withdrawn or otherwise set apart *as refuges or reservations for the protection of wildlife*" were excepted from this grant. *Id.* (emphasis added.) The filing of the application here did *not* withdraw or otherwise set apart any lands *as a refuge or reservation*, for the administrative regulations governing such applications provided that there was no change in the administration of the lands unless and until the

application was granted. The legislative history of section 6(e) of the Alaska Statehood Act makes clear that Congress intended it to reach only lands which had in fact been withdrawn and reserved as wildlife refuges as of statehood, not lands where the decision whether to withdraw and reserve them remained pending. The Deputy Solicitor of Interior concluded shortly after statehood that applications for the withdrawal and reservation of tidelands for refuge purposes did not prevent the transfer of the applied for lands to Alaska. Solicitor's Opinion M-36562 (1959) (Alaska Exhibit ("Ak. Ex.") 76). That contemporaneous construction of the effect of the Submerged Lands Act grant on an application for withdrawal is entitled to deference by this Court. *Watt v. Alaska*, 451 U.S. 259, 272-73 (1981).

The proviso in section 6(e) on which the United States relies, moreover, only excepted refuge lands from *that section's* grant of property to Alaska. It did not except anything from the Submerged Lands Act grant to Alaska under *section 6(m)* of the Statehood Act. In fact, the legislative history of the Alaska Statehood Act reveals that Congress affirmatively intended the Submerged Lands Act grant to Alaska to include *all* submerged lands within the new State's boundaries.

III. Because a new State's sovereign ownership of submerged lands under the equal footing doctrine "is an inseparable attribute of the equal sovereignty guaranteed to it on admission," *Louisiana*, 363 U.S. at 16, Congress could not condition Alaska's admission to the Union on the State's relinquishment of its entitlement to those lands. *Coyle v. Smith*, 221 U.S. 559, 566-74 (1911).

IV. Where an international duty or a public exigency necessitates federal retention of submerged lands, the United States' retained interest should be limited to only those rights

absolutely necessary to discharge the duty or deal with the exigency. This would permit the United States to fulfill its national responsibilities while simultaneously fulfilling at least some of the State's submerged lands entitlement. To accommodate both the United States' and Alaska's legitimate interests, the United States' retention of any rights to submerged lands should be limited to the minimum necessary to fulfill the purpose of the withdrawal and reservation.

ARGUMENT

I. The application did not defeat Alaska's submerged lands entitlement under the equal footing doctrine.

Despite acknowledging that at least some of the lands in issue under its exception are subject to the equal footing doctrine, it is not surprising that the United States virtually ignores the more than 150 years of this Court's jurisprudence establishing and applying the constitutional equal footing doctrine. The original thirteen States succeeded to the British Crown's sovereign title to such lands following the revolution. *Martin*, 41 U.S. (16 Pet.) at 410. Title to such lands vests in subsequently admitted States to ensure that they join the Union on an "equal footing" with the original thirteen. *Pollard*, 44 U.S. at 229-30. To implement this equal footing doctrine, the United States holds such lands in a territory "in trust" for future States that might be created out of the territory. *Id.* at 230. The United States has the power under the Property Clause[4] to convey such lands to third parties prior to statehood, but has never done so under

[4] U.S. Const. art. IV, § 3, cl. 2.

the general public land laws. *Shively v. Bowlby*, 152 U.S. 1, 48 (1894). Instead, Congress will defeat a new State's title only "in exceptional instances when impelled to particular disposals by some international duty or public exigency." *Holt State Bank*, 270 U.S. at 55.

> A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain," or was rendered "in clear and especial words," or "unless the claim confirmed in terms embraces the land under the waters of the stream."

Montana, 450 U.S. at 552 (citations omitted).

> Indeed, in only a single case -- Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) -- have we concluded that Congress intended to grant sovereign lands to a private party. The holding in Choctaw Nation, moreover, rested on the unusual history behind the Indian treaties at issue in that case, and indispensable to the holding was a promise to the Indian Tribe that no part of the reservation would become part of a State. Choctaw Nation was thus literally a "singular exception," in which the result depended "on very peculiar circumstances."

Utah, 482 U.S. at 198 (citations omitted).

The Court has never held that Congress may defeat a State's equal footing doctrine title by a pre-statehood federal withdrawal and reservation of lands underlying navigable waters. In *Utah*, the only case where that issue was

presented, the Court specifically declined to reach the issue because, even if a reservation could have that effect, it was not accomplished on those facts. *Id.* at 201. In reaching that determination, however, the Court made clear that the same considerations that apply to a claim that a pre-statehood conveyance defeated State title also apply to a claim that a pre-statehood withdrawal and reservation defeated State title:

> [T]he strong presumption is against finding an intent to defeat the State's title. . . . Congress "early adopted and constantly has adhered" to a policy of holding land under navigable waters "for the ultimate benefit of future States." Congress, therefore, will defeat a future State's entitlement to land under navigable waters only "in exceptional instances," and in light of this policy, whether faced with a reservation or a conveyance, we simply cannot infer that Congress intended to defeat a future State's title to land under navigable waters "unless the intention was definitely declared or otherwise made very plain."
>
> . . . .
>
> Given the long-standing policy of holding land under navigable waters for the ultimate benefit of the States, therefore, we would not infer an intent to defeat a State's equal footing entitlement from the mere act of reservation itself. Assuming arguendo that a reservation of land could be effective to overcome the strong presumption against the defeat of state title, the United States would not merely be required to establish that Congress clearly intended to include land under navigable waters within the federal reservation; the United States would additionally have to establish that Congress affirmatively intended to defeat the future State's title to such land.

Id. at 201-02 (citations omitted).

The pre-statehood actions relied on by the United States here meet none of the criteria established by the Court for finding that Alaska's title to equal footing doctrine lands was defeated.

A. The filing of the application did not reflect an "exceptional instance impelled by an international duty or public exigency."

Congress will defeat a State's equal footing doctrine title only in "exceptional instances when impelled to particular disposals by some international duty or public exigency." *Holt State Bank*, 270 U.S. at 55. At the time Alaska was admitted to the Union, no decision had been made that the lands should be withdrawn and reserved *as a wildlife refuge*. This fact, standing alone, establishes that there was no exceptional instance impelled by some international duty or public exigency that would have caused Congress to deviate from its policy of not defeating State title.

The mere filing of an application did not establish that it would be granted. There were virtually no limitations on the filing of applications. Section 295.9 of Title 43 of the Code of Federal Regulations provided that applications for withdrawals and reservations for virtually any purpose could be filed by "the heads of Federal agencies and instrumentalities and of States and the Territory of Alaska and their political subdivisions or any subordinate officer designated by them." 43 C.F.R. § 295.9 (1958 Supp.). The filing of even frivolous applications triggered an administrative review process. 43 C.F.R. § 295.12 (1958 Supp.). It did not, however, affect the administrative

jurisdiction over the lands and did not change the way in which they were administered. 43 C.F.R. § 295.11(a) (1958 Supp.). The lands were not withdrawn and reserved for the purposes for which the application had been filed until the review process was completed, and then only if the application were granted. 43 C.F.R. § 295.13 (1958 Supp.).

In this case, no change in administration occurred for more than three years after the filing of the application, almost two years after Alaska was admitted to the Union and its submerged lands entitlement under the equal footing doctrine vested.[5] As a result, the lands were not withdrawn and reserved *as a wildlife refuge* at the time of statehood.[6] That, in turn, establishes that, at the time of Alaska's admission, there was no exceptional circumstance impelled by an international duty or public exigency which would have caused Congress to defeat Alaska's title (even assuming *arguendo* that a completed withdrawal and reservation *as a refuge* would so qualify, which Alaska denies).

The fact that the application ultimately was granted after Alaska statehood does not change the result. The United States concedes that under its submission Congress would have defeated Alaska's equal footing doctrine title to these lands *whether the application was granted or not*: "If the Secretary had ultimately denied the application, the United States would have continued to own these submerged lands

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[5] The application was filed in November of 1957; Alaska was admitted to statehood in January of 1959; and the application was acted on in December of 1960. Report at 447-50.

[6] The United States does not contend that the filing of the application resulted in the lands being administered *as* a refuge. It simply notes that, under the administrative regulations, the lands were administered "in accordance with the limitations that apply to wildlife refuges." United States' Brief at 41.

-- just as it had during the territorial period -- unless and until Congress elected to convey them to Alaska." United States' Brief at 46. This would be true even if the application ultimately were denied specifically because there were no exceptional circumstances impelled by an international duty or public exigency.

In other words, Alaska's title would have been defeated whether exceptional circumstances impelled by an international duty or a public exigency existed or not. This Court's decisions preclude this result.

B. The application for withdrawal did not include submerged lands.[7]

Even assuming *arguendo* that the application for withdrawal qualified as an exceptional instance impelled by an international duty or public exigency (and it did not, as shown above), the application did not defeat Alaska's equal footing doctrine title. The Court has established a presumption against the inclusion of lands underlying navigable waters in pre-statehood federal disposals or withdrawals and reservations, and the United States must "establish that Congress clearly intended to include land

[7] The Master recommends that the Court find that the application included both the tidelands and the submerged lands underlying the coastal lagoons along this portion of Alaska's northern coast. Report at 477-99 and 505. Alaska did not except to this recommendation as the Court has indicated that subsidiary matters "need not be dealt with separately, as they are merged in the ultimate question," *New Mexico v. Texas*, 275 U.S. 279, 286 , *modified as to other issues*, 276 U.S. 557 (1928), and on the "ultimate issue" of title to the disputed lands the Master recommended in Alaska's favor. The United States took this same approach in *United States v. Maine (Massachusetts Boundary Case)*, 475 U.S. 89 (1981). *See* Reply Brief for the United States (Sept. 1985), *United States v. Maine* (*Massachusetts Boundary Case*) (No. 35, Original) (Oct. Term, 1985), at 2 n.2.

under navigable waters within the federal reservation." *Utah*, 482 U.S. at 202.

The application and the notice of it given to the public, however, stated that the intent was to withdraw the applied for lands from "all forms of appropriation under the public land laws" except mineral leasing and mining locations. *See* Report at 447 n.1 (application) and 448 n.2 (public notice). Under the applicable regulation, the filing of the application temporarily segregated the lands from "settlement, location, sale, selection, entry, lease, and other forms of disposal *under the public lands laws* . . . to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal." 43 C.F.R. § 295.11(a) (1958 Supp.). As the Court noted in *Utah*, lands underlying navigable waters

> were *already* exempt from sale, entry, settlement, or occupation under the general land laws. As this Court recognized in Shively v. Bowlby, [152 U.S.] at 48, "Congress has never undertaken by general land laws to dispose of" land under navigable waters. See also Mann v. Tacoma Land Co., 153 U.S. 273, 284 (1894) (applying Shively v. Bowlby, supra, to hold that "the general legislation of Congress in respect to public lands does not extend to tide lands"); Illinois Cent. R. Co. v. Illinois, 146 U.S. 387, 437 (1892) (holding that "the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters . . . applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea"). Therefore, little purpose would have been served by the reservation of the bed of the [waterbody at issue]."

482 U.S. at 203. This analysis precludes finding that the application included submerged lands, for the United States has failed to show that the submerged lands at issue here were subject to disposal under the public lands laws.

In addition, the public notice described the boundary of the applied for lands in a manner that excluded the submerged lands below the line of extreme low water:

> Beginning at the intersection of the International Boundary line between Alaska and Yukon Territory, Canada, with *the line of extreme low water* of the Arctic Ocean in the vicinity of Monument One of said International Boundary line;
>
> Thence westerly *along the said line of extreme low water*, including all offshore bars, reefs, and islands to a point on the Arctic Seacoast known as Brownlow Point . . . .

See Report at 449 n.2 (emphasis added).

On its face, this description does not include any submerged lands below the line of extreme low water. It begins "at the line of extreme low water" and proceeds westerly along that line. If it were not for the words "including all offshore bars, reefs, and islands," it is undisputed that the boundary would have followed the sinuousities of the low water line along the mainland. *See* Volume I of the Transcript ("I Tr.") at 149-50 (testimony of Mr. Hoffman, an expert in surveying and cartography; *see also* I Tr. at 136-37). Alaska contends that the phrase "including all offshore bars, reefs, and islands" simply includes within the boundary those offshore bars, reefs, and islands that are above the line of extreme low water. The

United States claims and the Master recommends, however, that this phrase establishes as the boundary a single line that runs along the outer edge of the barrier islands and connects the endpoints of the islands, thereby including within the exterior boundary the lands underlying the coastal lagoons.[8]

The parties submitted a wealth of evidence and argument on this boundary description issue. Alaska will not repeat that entire presentation here, and rests its submission on three points. First, at the 1980 trial on this issue, the Chief of the Division of Realty of the Fish and Wildlife Service in the Department of Interior[9] testified that his predecessor changed the boundary description in the application as initially filed from the line of mean high water to the line of extreme low water, Tr. at 48-50, "to protect the resources that are very significant in the intertidal zone." Tr. at 69. He never suggested that the intent of this change to the boundary description was to establish as the boundary a single line along the outer shore of the islands and connecting their endpoints.

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[8] Ironically, both the United States and the Master deny that the line they advance as the seaward boundary of the applied for lands is Alaska's coast line for Submerged Lands Act purposes, even though the United States' expert on boundary descriptions testified at the 1980 trial on this issue that one standing on the mainland would not be looking at the open sea of the Arctic Ocean but instead at lagoon waters. The Submerged Lands Act defines "coast line" as "the line of ordinary low water along that portion of the coast *which is in direct contact with the open sea* and the line marking the seaward limit of inland waters." 43 U.S.C. § 1301(c) (emphasis added). Reference to the Master's Figures 9.1 and 9.2, Report facing p. 450, makes clear that the United States' witness was correct and the lagoon waters do not constitute the "open sea" of the Arctic Ocean. If the boundary description of the applied for lands is a single continuous line along the outer shore of the islands and connecting their endpoints, it necessarily is coextensive with Alaska's coast line for Submerged Lands Act purposes.

[9] *See* I Tr. at 46.

Second, the United States' expert witness interpreting this description as establishing a boundary along the outer shore of the islands and connecting their endpoints conceded that such a line did *not* follow "the line of extreme low water" but, instead, departed from that line in order to cross bodies of water. I Tr. at 182-83 and 185-87. He also conceded that his line "is based on a general impression and interpretation of the language" in the description, *id.* at 187, even though several different lines could be drawn under the criteria he employed and that he would be "the first to admit that some of these lines do have a bit of subjectivity to them, yes." *Id.* at 190. This violates the principle, described by the California Supreme Court, that "the law abhors want of definition in matters of boundary as nature abhors a vacuum." *City of Oakland v. Oakland Water-Front Co.*, 118 Cal. 160, 177, 50 P. 277, 283 (1897).

Finally, the United States knew how to write a legal description that, by its terms, included submerged lands within an exterior boundary when that was its intent. For example, Executive Order 3797-A, establishing the National Petroleum Reserve--Alaska, described the seaward boundary of that pre-statehood withdrawal and reservation as the "highest highwater mark on the Arctic coast" and went on to explain that

> [t]he coast line to be followed shall be that of the ocean side of the sandspits and islands forming the barrier reefs *and extending across small lagoons from point to point*, where such barrier reefs are not over three miles off shore, except in the case of Plover Islands . . . where it shall be the highest highwater mark on the outer shore of the islands forming the groups *and extending between the most adjacent points of these islands and the sandspits at*

> *either end.*

See Report at 345-46 (emphasis added).

The legal descriptions in applications for two other wildlife refuges, moreover, explicitly provided that the boundaries described were single continuous lines along the outer shore of islands and connecting their endpoints, and that the intervening water areas were enclosed within those exterior boundaries. *See* 19 Fed. Reg. 8076-77 (1954);[10] 20 Fed. Reg. 4227-28 (1955).[11] The absence of such language

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[10] This application for what eventually became the Izembek refuge (*see* Public Land Order 2213, 25 Fed. Reg. 12,599-600 (1960)) described a boundary that ran, in part, from

> the most northerly point of Cape Glazenap, approximate Lat. 55°16', Long. 168°00': thence N. 52° 30' E., 1.28 miles across the Cape Glazenap inlet to Izembek Bay, to a point at low-water line of Glen Island, one of the Kudlakof Islands: thence northeasterly with the low-water line of Bering Sea, 4.90 miles to a point on the northerly shore of Glen Island at approximate Lat. 55°19', Long. 162°54'20": thence No. 35° 15' E., 2.52 miles, across an inlet to Izembek Bay, to a point on the low-water line of Operl Island, one of the Kudlakof Islands; thence northeasterly with the low-water line of Bering Sea, 8.10 miles to the most northerly point of Operl Island at approximate Lat. 55°24'30", Long. 162°42': thence due east 3.22 miles, across an inlet to Izembek Bay, to a point on the southern shore of Neumann Island; thence northeasterly with the low-water line of Bering Sea, 3.38 miles to the most northeasterly point of Neumann Island, at approximate Lat. 55°26'50", Long. 162°34'50"; thence N. 71° 00' E., 0.22 mile, across an inlet to Moffet Bay, to Moffet Point on the Alaska Peninsula . . . [and] 6.63 miles across Cold Bay

19 Fed. Reg. at 8077. The description concluded by noting that it contained "500 square miles of land *together with 183 square miles of open water*." *Id.* (emphasis added). (All of that "open water," it should be noted, was enclosed by the islands connected by the straight lines crossing the various inlets.)

[11] This application for a Kuskokwim refuge described a boundary that ran, in part, "across the mouth of Hazen Bay," and stated that it included "1,054 square miles of lands *and waters*." 20 Fed. Reg. at 4228 (emphasis added).

in the application at issue here is strong evidence that the Interior Department did *not* intend a single exterior boundary line along the outer shore of the islands and connecting their endpoints, thereby enclosing the intervening water areas.

In addressing this evidence, the Master unfortunately does not compare the *application* at issue here with the *applications* for the Izembek and Kuskokwim refuges. Instead, he compares the application at issue here only with the Public Land Orders *establishing* the Izembek and Kuskokwim refuges in 1960, *after* statehood, which expressly *excluded* lands subject to the transfer of title to Alaska under the Submerged Lands Act. Report at 493. This exclusionary language reflected the Deputy Interior Solicitor's determination that submerged lands included in applications filed prior to statehood could *not* be included in refuges after statehood because title to these lands had passed to the new State of Alaska under the Submerged Lands Act. Solicitor's Opinion M-36562 (1959) (Ak. Ex. 76). It thus was appropriate in the post-statehood orders establishing the Izembek and Kuskokwim refuges to state explicitly that submerged lands, which had expressly been *included* within the boundaries described in the applications, were explicitly *excluded* from the lands withdrawn in the orders establishing the refuges.

The absence of *exclusionary* language in the order granting the application at issue here simply reflects the absence of *inclusory* language in the application. As the Master notes, one would "expect reasonable consistency in the style of description across different refuges." Report at 491. That is particularly true for the orders establishing these three refuges, for they all were issued on the same day, December 6, 1960. Report at 493. Thus, if there had been any intent to establish a single continuous boundary line in

the application at issue here, as there clearly was in the Izembek and Kuskokwim applications, the same disclaimer language would have appeared in all three orders. The lack of such language in the order granting the application at issue here is strong evidence that it did not describe a single continuous boundary line along the outer shore of the islands and connecting their endpoints.

Under Alaska's interpretation of the boundary description, tidelands -- the lands between the line of extreme low water and the high tide line which the United States concedes are subject to the equal footing doctrine; *see* United States' Brief at 51-53 -- were within the described boundaries. The mere fact that the tidelands lie within these exterior boundaries, however, does not mean that they were *included* so as to defeat Alaska's equal footing doctrine title. "The mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the [submerged lands] part of the conveyed land, especially when there is no express reference to the [submerged lands] that might overcome the presumption against its conveyance." *Montana*, 450 U.S. at 554. In *Montana*, although all of the disputed riverbed lands were within the exterior boundaries of an Indian reservation, the treaty creating the reservation did not defeat State title because it "in no way expressly referred to the riverbed, nor was an intention to convey the riverbed expressed in 'clear and especial words' or 'definitively declared or otherwise made very plain.'" *Id.* (citations omitted). The same is true of the application here.

The application's failure to refer explicitly to the tidelands is particularly significant since virtually contemporaneous federal actions explicitly referred to tidelands when that was what was intended. *See* Public Land Order 1749, 23 Fed. Reg. 8623 (1958) (Ak. Ex. 73), which withdrew as the

Simeonof National Wildlife Refuge, *inter alia*, "[a]ll of Simeonof Islands *and its tidelands*" (emphasis added), and the application for an addition of "[a]ll tidelands . . . adjacent to the Aleutian Islands National Wildlife Refuge" to that refuge. 23 Fed. Reg. 8163 (Ak. Ex. 74) and 9039 (1958). As the Master notes,

> the Fish and Wildlife Service in Washington regularly reviewed, and often modified, the boundary descriptions received from its regional offices. One should therefore expect reasonable consistency in the style of descriptions across different refuges.

Report at 491 (citation to Tr. omitted). These pre-statehood federal actions expressly referred to tidelands while the contemporaneous application at issue here does not. The only reasonable inference is that tidelands were *not* included in the latter, for a court must not infer an intent to *include* the tidelands "unless the intention was definitely declared or otherwise made plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land under the waters the stream," the legal equivalent of the tidelands here. *Montana*, 450 U.S. at 552 (quotations and citations omitted).

Also supporting this result are the Public Land Orders establishing the Izembek and Kuskokwim refuges discussed above. Where tide and submerged lands arguably were included in a pre-statehood application, the Interior Department explicitly excluded them from the ensuing withdrawals consistent with the Deputy Interior Solicitor's determination that title to the lands had passed to Alaska under the Submerged Lands Act. The fact that the order granting the application at issue here did not expressly

exclude the tidelands simply reflects the fact that it was not intended to, and did not, *include* tidelands in the applied for lands.

In short, the United States has not established that "Congress clearly intended to include land under navigable waters within the federal reservation" as required by the first prong of the *Utah* test. *Utah*, 482 U.S. at 202. Thus, the filing of the application for withdrawal at issue did not defeat Alaska's submerged lands entitlement under the equal footing doctrine.

C. There is no evidence that Congress affirmatively intended to defeat Alaska's equal footing doctrine title to tidelands within the boundaries described in the application, much less the disputed submerged lands below the line of extreme low water.

The United States points to nothing in the Alaska Statehood Act or its legislative history even intimating that Congress "affirmatively intended to defeat" Alaska's title to equal footing doctrine lands, the second prong of the *Utah* test. *Utah*, 482 U.S. at 202. That is understandable, for the legislative history of the Alaska Statehood Act reveals a congressional intent *not* to *defeat* Alaska's equal footing doctrine title. Instead, the legislative history establishes that Congress intended to *ensure* that Alaska joined the Union on an equal footing with respect to submerged lands title *in fact* as well as in concept.

In hearings on Alaska statehood, both members of Congress and representatives of federal executive branch agencies discussed the equal footing doctrine and its statutory codification in the Alaska Right-of-Way Act of

May 14, 1898, ch. 299, 30 Stat. 409 (formerly codified at 48 U.S.C. § 411; current version primarily codified at 43 U.S.C. §§ 942-1 to 942-9 (1986)). A Justice Department official[12] recommended that no private title be permitted to tidelands because that would be "contrary to the public policy of the United States" and specifically contrary to the 1898 Act which provided that lands underlying navigable waters in the Territory of Alaska "shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said Territory." *1954 Senate Hearings* at 215-16. Subsequent discussion revealed that both the Committee and the federal officials advising it understood the historical background of the doctrine and that the act admitting Alaska to the Union did not need any specific language to accomplish that result. *Id.* at 223-25.

The Committee adopted the language now appearing in section 1 of the Alaska Statehood Act that describes Alaska as consisting of "all the territory, *together with the territorial waters appurtenant thereto*, now included in the Territory of Alaska . . . to include, if inclusion be necessary, the lands beneath inland navigable waters of the State.". *1954 Senate Hearings* at 280 (emphasis added). The Committee considered the 1898 Act "a declaration with respect to reservation for a future State of rights in navigable waters," *id.* at 281 (comment by Senator Cordon), and a "reservation for the future State of Alaska by a Federal statute," *Id.* (comment by Senator Daniel). Senator Jackson wrapped up the discussion by making clear his intent, concurred in by the Committee, that Alaska receive title to all the submerged

[12] Ralph Barney was the Chief, Indian Claims Branch, Lands Division, Department of Justice. *Alaska Statehood: Hearings on S. 50 before the Senate Committee on Interior and Insular Affairs*, 83d Cong., 2d Sess. ("*1954 Senate Hearings*") III (1954).

lands within its boundaries:

> Senator JACKSON. May I ask this question? Is there any Federal dominion outside of the geographical boundaries of the Territory of Alaska, outside the geographical boundaries?
>
> . . . .
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> Senator JACKSON. My only reason for the question is that *I want to make sure that we are in effect conveying everything there is up there [in terms of submerged lands], as far as the overall boundary lines are concerned, to the new State; everything in that area insofar as the geographical boundary lines are concerned.*

Id. at 282 (emphasis added).

The 85th Congress that enacted the Alaska Statehood Act also recognized that the United States held the submerged lands for the benefit of the new State. S. Rep. No. 1720, 85th Cong., 2d Sess. (1958), *reprinted in* 2 1958 U.S. Code Cong. & Admin. News 2893, 2899; S. Rep. No. 1045, 85th Cong., 1st Sess. (1957), *reprinted in* 2 1957 U.S. Code Cong. & Admin. News 1933. It fully understood that "if Alaska goes into statehood [it] would get 100 percent of the navigable waters."[13] *Hearings before the Subcommittee on*

[13] The Master concludes that the "100 percent" did not refer to what submerged lands Alaska would receive at statehood but to what the new State's share of royalties would be under the bill being considered. Report at 436 n.75. Only if Alaska received *title* to the lands upon admission, however, would it receive *100* percent of the royalties. If admitted to statehood, Alaska at that point would have received only the same 37 1/2 percent share of oil and gas revenues from federal lands that other States received under section 35 of the Mineral Leasing Act of 1920, 30 U.S.C. § 191 (1940). In section 28(b) of the Alaska Statehood Act, Congress amended section 35 of the Mineral Leasing Act to provide that Alaska would receive an additional 52 1/2 percent of oil and gas

Territories of the Senate Committee on Interior and Insular Affairs, 85th Cong., 1st Sess. (1957), *reprinted in Alaska Submerged Lands: Hearings on H.R. 8054 before the Senate Committee on Interior and Insular Affairs*, 85th Cong., 2d Sess. 117, 124 (1957).

Finally, Congress expressed considerable displeasure that the beneficial effects of the public lands laws in Alaska had been "vitiated . . . through the creation of tremendous federal reservations." H.R. Rep. No. 624, 85th Cong., 1st Sess. 6 (1957). More than one-fourth of Alaska -- approximately 95 million acres[14] -- was included in those withdrawals and reservations. *Id.* Much of the remaining area "is covered by glaciers, mountains, and worthless tundra." *Id.* The extensive withdrawals "might well embrace a preponderance of the more valuable resources needed by the new State . . . to support itself and its people." *Id.* Although the committee could not make a detailed survey of each one, it was "strongly of the opinion that a considerable number of [them] are either excessive in size or totally unnecessary." *Id.* at 8. Had Congress believed that one or more of these withdrawals included submerged lands *and* that continued federal ownership of those submerged lands justified abandoning its consistent policy of holding the lands for the benefit of a new State, it would have said so but did not.

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revenues from lands retained by the United States in recognition of the fact that, unlike the other States, Alaska received no benefits under the Reclamation Act of 1902 into which 52 1/2 percent of federal oil and gas revenues otherwise would be deposited. *See* H.R. Rep. No. 624, 85th Cong., 1st Sess. 23 (1957). The point, however, is that *only* if Alaska received *title* to the lands at statehood would it receive *100* percent of the royalties.

[14] This is only slightly smaller than the land area of California. *See* 2 Aaron L. Shalowitz, *Shore and Sea Boundaries* 477 (U.S. Dept. of Commerce Pub. 10-1, 1964) (The total area of California is 158,693 square statute miles. There are 640 acres to a square mile, producing an area expressed in acres of 101,563,520).

All of this legislative history is flatly inconsistent with an affirmative congressional intent to defeat Alaska's equal footing doctrine title to submerged lands. Indeed, it establishes precisely the opposite: Congress affirmatively intended that Alaska take title to *all* submerged lands within its boundaries as an incident of statehood.

In any event, the United States has not established that "Congress affirmatively intended to defeat the future State's title" as required by the second prong of the *Utah* test. *Utah*, 482 U.S. at 202. For this reason, too, the filing of the application for the withdrawal at issue here did not defeat Alaska's submerged lands entitlement under the equal footing doctrine.

II. The application did not defeat Alaska's submerged lands entitlement under the Submerged Lands Act.

A. The principles the Court established in the equal footing doctrine cases apply equally to offshore submerged lands not subject to the doctrine.

In briefing its exception, the United States virtually ignores this Court's equal footing doctrine jurisprudence. Instead, it focuses its argument almost exclusively on the Submerged Lands Act, claiming that the Court should apply as strong a presumption in favor of continued federal ownership of lands subject to the Act as it applies in favor of the States for lands subject to the equal footing doctrine. United States' Brief at 34. It also argues that the Court should view the Submerged Lands Act grant no differently than any other statutory federal grant, and should strictly construe it in favor of the United States. *Id.* at 36. The

United States is wrong on both counts.

Congress intended the same presumption of State ownership to apply to lands granted by the Submerged Lands Act and lands subject to the equal doctrine. The Submerged Lands Act was Congress's direct response to this Court's holding in the 1947 *California* decision, that the equal footing doctrine did *not* apply to offshore submerged lands within State boundaries. "The very purpose of the Submerged Lands Act was to undo the effect of this Court's 1947 decision in *United States v. California*, 332 U.S. 19," *United States v. California*, 436 U.S. 32, 37 (1978) (the "1978 *California* case") -- *i.e.*, to rewrite the law as found by the Court in the 1947 *California* decision and *apply* the *Pollard* equal footing doctrine rule of State ownership to offshore submerged lands within State boundaries.

Congress's purpose here was twofold. First, it intended to grant offshore submerged lands within State boundaries to the coastal states. Congress did not intend a merely gratuitous grant, however. Instead, it intended the grant to reflect the law as it had been believed to be prior to the Court's 1947 *California* decision. Second, Congress intended to prevent further erosion of the equal footing doctrine by either the federal executive or this Court. Congress noted that the United States Attorney General had vigorously attacked the rational of this Court's equal footing doctrine cases in the 1947 *California* decision and that the Court had the power to overrule those cases and might well do so if Congress did not prevent it legislatively

Consequently, Congress sought "to preserve the status quo as it was thought to be prior to the California decision," H.R. Rep. No. 1778, 80th Cong., 2d Sess. 2 (1948), *reprinted in* 2 1953 U.S. Code Cong. & Admin News 1385,[15]

[15] "The legislative history of all the bills considered prior to enactment of the Submerged Lands Act in 1953 is directly relevant to the latter Act" since the purposes were substantially similar, all prior hearings on predecessor bills were expressly incorporated into the record during hearings on the final bills, and similar references were made on the floor of Congress. *Louisiana*, 363 U.S at 17 n.16. Some of the following legislative history of the Submerged Lands Act was noted by the Court in that case, *id.* at 18-19 n.17.

and "to confirm and establish the rights and claims of the 48 States, long asserted and enjoyed with the approval of the Federal Government, to the lands and resources beneath navigable waters within their boundaries." *Id.* at 3; S. Rep. No. 1592, 80th Cong., 2d Sess. 5 (1948). Before the 1947 *California* decision, this Court's decisions had reflected State ownership of offshore submerged lands, as had decisions of lower federal and State courts and of the Attorneys General of the United States and federal agencies for 160 years; lawyers, legal publicists, and those claiming title under State authority "accepted this principle as the well-settled law of the land." H. R. Rep. No. 1778 at 4; S. Rep. No. 1592 at 5. "[T]he Court by its [1947 *California*] decision not only established the law differently from what eminent jurists, lawyers, and public officials for more than a century had believed it to be, but also differently from what the Supreme Court apparently had believed it to be." H.R. Rep. No. 1778 at 6; S. Rep. No. 1592 at 7.

> The committee recognizes that it is within the province of the Supreme Court to define the law as the Court believes it to be at the time of its opinion. However, the Supreme Court does not pass upon the wisdom of the law. That is exclusively within the congressional area of national power. *Congress has the power to change the law, just as the Supreme Court has the power to change its interpretation of the law by overruling pronouncements in*

its former opinions which have been accepted as the law of the land. Therefore, in full acceptance of what the Supreme Court has now found the law to be, Congress may nevertheless enact such legislation as in its wisdom it deems advisable to solve the problems arising out the decision.

Indeed, the power of the Congress *to establish the law for the future as it was formerly believed to be*, was, in effect, recognized by the Court in the California case . . . .

H.R. Rep. No. 1778 at 6 (emphasis added); S. Rep. No. 1592 at 7-8 (emphasis added). As the Court's decision left the status of offshore submerged lands unclear, "Congress should now remove all doubt about the titles by ratifying and confirming the title long asserted by the various States." H.R. Rep. No. 1778 at 8-9; S. Rep. No. 1592 at 10.

The rationale of the so-called [*Pollard*] inland water rule was vigorously attacked by the Attorney General of the United States in the California case, Although he did not ask that it be overruled, he did state that "the tidelands and inland waters rule is believed erroneous."[16]

The Supreme Court has as much power to overrule its prior decisions laying down the inland-water rule as it had power to change its belief regarding ownership of the

[16] The Deputy Solicitor General representing the United States before the Master in this case shared this view, stating that "alas, our Supreme Court went astray in the 1840's" when it established the equal footing doctrine rule of State ownership in the "dubious" *Pollard* decision. L.F. Claiborne, *Federal-State Offshore Boundary Disputes: The Federal Perspective*, Law of the Sea Eighteenth Annual Conference (1984), *reprinted in The Developing Law of the Oceans* 360-61 (R. Krueger and S. Riesenfeld, eds., 1985).

marginal belt within the boundaries of the States; *and it may well do so in view of its holding in the California case, unless Congress acts to establish the law for the future.*

H.R. Rep. No. 1778 at 12; S. Rep. No. 1592 at 14 (footnote omitted) (emphasis added).

The repeated assertions by our highest Court for a period of more than a century of the doctrine of State ownership of all navigable waters, whether inland or not, and the universal belief that such was the settled law, have for all practical purposes established a principle which the committee believes should *as a matter of policy be recognized and confirmed by Congress as a rule of property law.*

H.R. Rep. No. 1778 at 16 (emphasis added); S. Rep. No. 1592 at 18 (emphasis added).

Here we have the broad question whether Congress should confirm or whether it should reverse the traditional and long-accepted practice that submerged lands within a State's boundary and all resources therein belong in a proprietary sense to the States, subject, of course, to all powers delegated to the United States by the Constitution. This far-reaching historic policy should be reversed only if the national interest demands reversal. The committee is of the opinion that not only will the public interest be best served by confirming the rights of the States but that common justice and equity require such action.

H.R. Rep. No. 1778 at 17; S. Rep. No. 1592 at 19-20.

> Finally, it is the intent and purpose of this bill *to establish the law for the future so that the rights and powers of the States and those holding under State authority may be preserved as they existed prior to the decision of the Supreme Court of the United States in the California case.*

H.R. Rep. No. 1778 at 24 (emphasis added); S. Rep. No. 1592 at 26 (emphasis added).

The transfer of the United States' interest in both lands underlying inland navigable waters and offshore submerged lands in the Act

> *merely fixes as the law of the land that which*, throughout our history prior to the Supreme Court decision in the California case in 1947, *was generally believed and accepted to be the law of the land*; namely, *that the respective States are the sovereign owners of the lands beneath navigable waters within their boundaries* and of the natural resources within such lands and waters. Therefore, Title II recognizes, confirms, vests, and establishes in the States title to the submerged lands which they have long claimed, over which they have always exercised all the rights and attributes of ownership.

H.R. Rep. No. 695, 82d Cong., 1st Sess. 5 (1951), *reprinted in* 2 1953 U.S. Code Cong. & Admin. News 1395. The areas to which the Act would confirm the States' rights as "sovereign owners" of submerged lands, of course, included *both* lands beneath navigable inland waters and offshore submerged lands. *Id.*

Congress included both categories of lands within the Act's purview

> because they have been possessed, used, and claimed by the States under *the same rule of law*, to wit: That the States own all lands beneath navigable waters within their respective boundaries.
>
> The rule was stated by the Supreme Court in the early case of *Pollard v. Hagan* (3 How. 212, 229 (1845)) . . . .
>
> The majority opinion in the California case concedes that the Supreme Court in the past has indicated its belief that this Pollard rule of State ownership applies equally to all lands under navigable waters within State boundaries, whether inland or seaward . . . .
>
> *The purpose of this legislation is to write the law for the future as the Supreme Court believed it to be in the past -- that the States shall own and have proprietary use of all lands under navigable waters within their territorial jurisdiction, whether inland or seaward*, subject only to the governmental powers delegated to the United States by the Constitution.

S. Rep. No.133, 83d Cong., 1st Sess. 7-8 (1953), *reprinted in* 2 1953 U.S. Code Cong. & Admin. News 1474.

Finally, State ownership of all submerged lands within State boundaries was "in the public interest," *id.* at 5; H.R. Rep. No. 215, 83d Cong., 1st Sess. 5 (1953), *reprinted in* 2 1953 U.S. Code Cong. & Admin. News 1385, a principle explicitly embodied in section 3(a) of the Submerged Lands Act, 43 U.S.C. § 1311(a).

Congress thus "embraced" the legal principle that the United States had paramount rights to offshore submerged lands, *United States v. Maine*, 420 U.S. 515, 524 (1975),

only in the sense that it accepted the Court's statement of the law. It did not accept the consequences of the decision, and acted to reverse them by returning the law to what it was thought to be prior to the decision.

The law believed to apply to submerged lands within State boundaries, the law that Congress in the Submerged Lands Act wrote for the future, was the body of law that had emerged from this Court's equal footing doctrine cases. Under that law, as noted above, there is a strong presumption in favor of State title. *Utah*, 482 U.S. at 197-98 and cases cited therein. To effectuate Congress's determination that State ownership of submerged lands both onshore and offshore is in the public interest,[17] its intent that State ownership "be recognized and confirmed by Congress as rule of property law,"[18] and its purpose "to write the law for the future as the Supreme Court believed it to be in the past,"[19] this same presumption in favor of State title must be applied to offshore submerged lands under the Submerged Lands Act grant to the States.[20]

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[17] 43 U.S.C. § 1311(a).

[18] H.R. Rep. No. 1778, 80th Cong., 2d Sess. at 16; S. Rep. No. 1592, 80th Cong., 2d Sess. at 18.

[19] S. Rep. No. 133, 83d Cong., 1st Sess. at 8.

[20] The Court in *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 287 (1982), stated that its reading of the Submerged Lands Act in that case "adheres to the principle that federal grants are to be construed strictly in favor of the United States." As is clear on its face, that statement was not essential to the decision. It therefore is *dictum* and "not controlling." *Humphrey's Ex'r v. United States*, 295 U.S. 602, 627 (1935); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821). In that case, moreover, California sought to quiet title to 184 acres of oceanfront accretions to a Coast Guard facility. A decision in California's favor effectively would have made the Coast Guard a trespasser in going from the fast land to the water, raising the possibility that the Coast Guard might be precluded from discharging its statutory coastal

Thus, in the 1978 *California* case, the Court held that the federal withdrawal and reservation of a one-mile belt of tide and offshore submerged lands (not lands underlying inland navigable waters) around the Anacapa Islands in the Santa Barbara Channel did not defeat California's Submerged Lands Act title to those lands. 436 U.S. at 39-40. The United States relied on a section 5(a) exception to the Act's grant for "any rights the United States has in lands presently and actually occupied by the United States under claim of right." *Id.* at 38. The Court held that this "claim of right" exception did not reach the disputed lands because the reservation of the lands did not change the nature of the government's claim, *id.* at 40-41, implicitly rejecting the dissent's argument that the intent of the exception was to reach submerged lands that were "actually occupied." Strictly construing the section 5(a) exception in the 1978 *California* case *against* the United States and *in favor* of California was manifestly consistent with Congress's intent, and is the approach that should be followed here as well.

Both the 1978 *California* case and this case call for application of the Court's oft-stated rule that the party claiming the benefit of an exception must establish that the exception applies: "When a proviso like this carves an exception out of the body of a statute or contract, those who set up such exception must prove it." *Clemente Javierre v. Central Altagracia, Inc.*, 217 U.S. 502, 508 (1910) (citations omitted); *accord United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 366 (1967). Any other rule would require the individual States to demonstrate affirmatively

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defense, navigational safety, and search and rescue responsibilities. The *dictum* in that case is every bit as much the product of "peculiar circumstances" as was the decision in *Choctaw Nation*. It should be limited to its facts.

that the exceptions to the Submerged Lands Act do *not* apply. "Since as a practical matter it is never easy to prove a negative," *Elkins v. United States*, 364 U.S. 206, 218 (1960), such a rule would impose a heavy burden on the States to disprove a claim by the United States -- whether supported by evidence or not -- that it had "expressly retained" submerged lands at the time the State was admitted to the Union.

The exception in section 5(a) of the Submerged Lands Act on which the United States relies, moreover, is for lands "*expressly* retained by or ceded to the United States when the State entered the Union." 43 U.S.C. § 1313(a). "In matters of statutory construction the duty of this Court is to give effect to the intent of Congress, and in doing so our first reference is of course to the literal meaning of words employed." *Flora v. United States*, 357 U.S. 63, 65 (1958). The requirement that lands be "*expressly* retained" at minimum would seem to require affirmative evidence that an intent to retain "was definitely declared or otherwise made very plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land." That is precisely the formulation required for showing an intent to defeat State title under the equal footing doctrine. *Utah*, 482 U.S. at 198.

For these reasons, the Court should not presume that the United States retained title to offshore submerged lands and therefore resolve any doubts in its favor. To effectuate Congress's intent, the Court must apply the same strong presumption in favor of State title under the Submerged Lands Act as it applies to tidelands and lands underlying inland navigable waters under the equal footing doctrine. As the United States has not overcome that presumption, *see* part I *supra*, its exception must be rejected.

B. The application did not defeat Alaska's title even under the United States' statutory analysis.

The United States claims that Congress "expressly retained" the lands subject to the application in section 6(e) of the Alaska Statehood Act within the meaning of the exception to the Submerged Lands Act grant in section 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a). This argument mischaracterizes the nature and the legal effect of the application, the function and purpose of section 6(e) of the Alaska Statehood Act, and the language and intent of the Submerged Lands Act section 5(a) exception.

Section 5(a) excepts from the Submerged Lands Act grant to the States, *inter alia*, "all lands expressly retained by . . . the United States when the State entered the Union . . . . " The United States contends that the "application had the legal effect of designating 'lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife' for purposes of section 6(e) of the Alaska Statehood Act," and section 6(e) in turn "expressly retained" those lands at the time of statehood within the meaning of section 5(a) of the Submerged Lands Act. United States' Brief at 39.

Section 6(e) of the Alaska Statehood Act provides in pertinent part:

> All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law . . . and under the provisions of the Alaska commercial fisheries laws . . . shall be transferred and conveyed to the State of Alaska

> by the appropriate Federal agency: . . . *Provided*, that such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife . . . .

A mere *application* for a withdrawal for a refuge or reservation neither withdrew nor otherwise set apart any lands *as* a refuge or reservation. As the United States notes, the legal effect of an application was to

> temporarily segregate such lands from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land law, including the mining and the mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal.

United States' Brief at 41, citing 43 C.F.R. § 295.11(a) (1958 Supp.).

The United States fails to mention the final sentence of that regulation, which states: "Such temporary segregation *shall not affect the administrative jurisdiction over the segregated lands*." 43 C.F.R. § 295.11(a) (1958 Supp.). Under that provision, the application did not transfer administration of the lands to the applying agency and the lands were *not* withdrawn or otherwise set apart *as* a refuge or reservation within the meaning of section 6(e).

The United States objects to this "formalistic distinction between setting apart land 'as' a refuge, as opposed to 'for the purpose of' a refuge.'" United States' Brief at 42. That distinction, however, is central to the proper application of section 6(e). Interior Secretary Chapman proposed the language of section 6(e) in 1950. Report at 465-66 n.17. He

explained that the exception to the transfer of land to Alaska would apply only to "the Pribiloff islands, and over all other Federal lands and waters in Alaska *which have been set aside as wildlife refuges or reservations pursuant to the fur seal and sea otter laws, the migratory bird laws, or other Federal statutes of general application.*" *Id.* at 466 n.17 (emphasis added), quoting Secretary Chapman's April 20, 1950, letter to Senator Mahoney, chairman of the Senate Committee on Interior and Insular Affairs, S. Rep. No. 1929, 81st Cong., 2d Sess. 14 (1950). Congressional reports described the exception as applying only to "lands set apart *as* wildlife refuges or reservations," S. Rep. No. 1163, 85th Cong., 1st Sess. 17 (1957) (emphasis added), to "withdrawn lands *used in general wildlife and fisheries research activities*," H.R. Rep. No. 624, 85th Cong., 1st Sess. at 19 (emphasis added), to "wildlife refuges," S. Rep. No. 1028, 83d Cong. 2d Sess. at 31, and to "withdrawn wildlife refuges or reservations [and] facilities utilized therewith." H.R. Rep. No. 675, 83d Cong., 1st Sess. 17 (1953). Acting Interior Secretary Chilson interpreted the exception as applying only to "[l]ands *withdrawn or otherwise reserved* for research activities relating to fisheries or wildlife." S. Rep. No. 1163, 85th Cong., 1st Sess. at 33 (emphasis added); H.R. Rep. No. 624, 85th Cong., 1st Sess. at 24 (emphasis added).

Indeed, there is no evidence that Congress even knew that the application at issue here had been filed. The United States erroneously claims that "the Secretary of the Interior informed Congress of the pending application, and he submitted maps showing the area as a federal enclave embracing submerged lands." United States' Brief at 50, *citing* United States' Exhibit ("U.S. Ex.") 61. As the Master explained, however, U.S. Ex. 61 does *not* show the area subject to the application. Instead, it shows a much earlier

completed withdrawal and reservation, Public Land Order 82, Report at 483-84 n.34, which in 1943 withdrew and reserved the entire North Slope of Alaska and reserved the minerals therein "for use in connection with the prosecution of World War II." *Id.* at 452 n.7.

The United States also quotes the Master out of context in claiming that, "[a]s the Master acknowledged, Members of Congress 'might have considered the proviso broad enough to cover lands segregated by a withdrawal application.'" United States' Brief at 50, *citing* Report at 466. The Master said that, "[a]lthough members of Congress after 1952 might have considered the proviso broad enough to cover lands segregated by a withdrawal application, *I have found little evidence in the legislative history that they considered that possibility.*" Report at 466 (emphasis added) (footnote omitted). The Master cited only two references to the proposed refuge for which the application was filed in the legislative history of the Alaska Statehood Act. *Id.* at 466-67 n.18. The first pre-dated the November 1957 filing of the application at issue here, and thus could not have given Congress a basis for considering the applied for lands covered by section 6(e). *Statehood for Alaska: Hearings on H.R. 50 and Other Bills before the Subcommittee on Territorial and Insular Affairs of the House Committee on Interior and Insular Affairs*, 85th Cong., 1st Sess. 447 and 482-84 (1957). The second merely indicates that "[s]teps already have been taken to withdraw" the lands subject to the application at issue here, but gives no indication what those steps were and thus also gave Congress no basis for considering the applied for lands covered by section 6(e). Thus, there is in fact *no* evidence from which Congress "might have considered" section 6(e) broad enough to cover the lands covered by *this* application.

Shortly after statehood, moreover, the Deputy Solicitor of Interior addressed a question strikingly similar to that presented here. Solicitor's Opinion M-36562, (1959) (Ak. Ex. 76). A pre-statehood application sought the withdrawal and reservation of tidelands as an addition to the Aleutian Islands National Wildlife Refuge. *Id.* at 2. The Deputy Solicitor concluded that the applied for tidelands "clearly are within the areas to which the Submerged Lands Act of 1953 applies," and that the Act "with certain exceptions not pertinent here" transferred all of the United States' right, title, and interest to the State. *Id.* at 3. He noted that the temporary segregation of lands under the administrative regulations governing such applications was "not equivalent in effect to a Secretarial order [withdrawing the lands]" and, as a result, "the Secretary no longer has the jurisdiction over those areas necessary to effectively withdraw any portion of them for a wildlife refuge or as an addition to an existing one." *Id.* at 2-3. The Deputy Solicitor's contemporaneous administrative construction of an application's legal effect under the regulations on the new State of Alaska's submerged lands entitlement under the Submerged Lands Act is entitled to considerable deference by this Court. *Watt*, 451 U.S. at 272-73.[21]

Because lands subject to an application were not withdrawn or set apart *as* a refuge within the meaning of section 6(e) of the Alaska Statehood Act, they thus were not

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[21] A later Interior Solicitor "overruled" this 1959 contemporaneous administrative construction of the effect of the application under the regulations on Alaska's submerged lands entitlement in 1978. 86 Interior Dec. 151, 175-76 (1978). As in *Watt*, "[t]he Department's current interpretation, being in conflict with its initial position, is entitled to considerably less deference" and, as it did there, the Court should find the new position "wholly unpersuasive." 451 U.S. at 273 (citation omitted).

subject to the section 5(a) exception to the Submerged Lands Act for lands "expressly retained" by the United States at the time of statehood. Senator Cordon explained during the Senate floor debate on the Submerged Lands Act that "[t]he purpose of the ['expressly retained'] language is to reserve to the United States *those facilities and those areas which are used by the Government* in its governmental capacity for one or more of its governmental purposes." 99 Cong. Rec. 2619 (1953) (emphasis added). Lands subject to an application for a withdrawal were not "used" by the United States for the purpose for which the application was filed unless and until the application was granted.

The United States makes an even more fundamental error in relying on section 6(e) of the Statehood Act as an "express retention" of submerged lands under the Submerged Lands Act. Congress included section 6(e) in the Statehood Act to *transfer* property used for fish and wildlife management *to* Alaska, not to *retain* property:

> All real and personal property of the United States situated in the Territory of Alaska *which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law . . . and under the provisions of the Alaska commercial fisheries laws . . .* shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency . . . .

(Emphasis added.) Congress only excepted lands "withdrawn or otherwise set apart as refuges or reservations" from this specific grant of property to the new State under section *6(e)* -- "*such transfer* shall not include lands withdrawn or otherwise set apart as refuges or reservations,"

Id. (emphasis added) -- and *not* from the grant of submerged lands to Alaska under section *6(m)*, which applied the Submerged Lands Act to the new State.

Congress "expressly retained" no submerged lands in the Alaska Statehood Act. The United States cites nothing in the Act or its legislative history even intimating a congressional intent to retain some of the submerged lands that otherwise would be transferred to the new State under the Submerged Lands Act, much less "expressly" articulating such an intent. Indeed, the legislative history clearly indicates that Congress affirmatively intended all submerged lands in Alaska, including those offshore, to go to the new State upon admission. The Alaska Right-of-Way Act provided in part that title to the beds of navigable waters within the Territory of Alaska "shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said [Territory]" and defined the term "navigable waters" as including "all tidal waters up to the line of ordinary high tide." 30 Stat. at 409. Senator Daniel noted that Congress had used this Act in discussions on the Submerged Lands Act to show "that Congress recognized the States should own such lands," that they had been reserved by Congress in 1898 for the future State of Alaska, and that the 1898 reservation included "lands covered by territorial waters." *1954 Senate Hearings* at 281.

This is not to say that Congress did not consider imposing some limitations on the new State of Alaska's Submerged Lands Act grant. A Senate Committee adopted a proviso to the section applying the Submerged Lands Act to Alaska that would have required the new State to permit timber companies to use surface waters for timber operations in the Tongass National Forest in Southeast Alaska. *See* S. Rep. No. 1163, 85th Cong., 1st Sess. 20 (1957). Even that limited

proposed "retention," however, one which addressed only the water *surface* and *not* the submerged *lands*, was not included in the Alaska Statehood Act as enacted.

Accordingly, purely as a matter of statutory construction, the Master's determination that the application did not defeat Alaska's submerged lands entitlement under the Submerged Lands Act was correct.

III. Congress could not condition Alaska's admission to the Union on the State's relinquishment of its entitlement to equal footing doctrine lands.

The United States' argument that Congress demonstrated an intent to defeat the State's title to the submerged lands at issue through a provision of the Alaska Statehood Act is based on the unconstitutional premise that Congress can retain sovereign equal footing doctrine lands as a condition of statehood. The equal footing doctrine prohibits the United States' retention of submerged lands in a statehood act.

As the State argued in its opening brief, this Court has long considered provisions of a statehood act that purport to condition the new State's admission to the Union on a retention by the United States of a part of the new State's sovereignty to violate the equal footing doctrine, *see* Alaska's Brief at 66-70, and Alaska will not repeat that entire discussion here. The point, however, applies equally to the equal footing doctrine lands at issue here.

In brief, the Court held in *Pollard* that a state's title to lands underlying navigable waters is conferred by the Constitution, and thus Congress cannot retain title as a condition of statehood. 44 U.S. at 229 ("no compact that might be made between [Alabama] and the United States could diminish or enlarge these rights"); *see also* the Court's

discussion of *Pollard* in *Corvallis Sand & Gravel*, 429 U.S. at 374 ("[t]he Court established the absolute title of the States to the beds of navigable waters, a title which neither a provision in the Act admitting the State to the Union nor a grant from Congress to a third party [after statehood] was capable of defeating." (footnote omitted)). The Court reaffirmed and extended this rule in *Coyle*, 221 U.S. 559, holding that a limitation on Oklahoma's sovereign power to determine the location of its capital imposed in the statehood act as a condition of admission was invalid because the Constitution requires that all new states be admitted with all the powers of sovereignty and jurisdiction that pertain to the original states. *Id.* at 566-74.

The United States' retention of lands underlying navigable waters as a condition of statehood of necessity would require that the State enter the Union on less than equal footing. Assuming for the sake of argument that section 6(e) of the Alaska Statehood Act demonstrated an affirmative Congressional intent to defeat Alaska's title to equal footing doctrine lands, and it did not, it would constitute an unconstitutional condition to statehood that would be void.

IV. Finally, when an international duty or a public exigency necessitates federal retention of submerged lands, the United States' retained interest should be limited to only those rights absolutely necessary rather than fee title.

The State argued in its opening brief that in any case where an international duty or a public exigency necessitates federal retention of submerged lands, the United States' retained interest should be limited to only those rights absolutely necessary to discharge the duty or deal with the

exigency, Alaska's Brief at 70-71, and will not repeat that discussion here. As with the argument made in part III *supra*, however, the point applies equally here. In brief, limiting the United States' retained interest to only those rights absolutely necessary to discharge an international duty or deal with a public exigency permits the United States to fulfill its national responsibilities while simultaneously fulfilling at least some of the State's submerged lands entitlement.

As applied here, assuming that the application retained submerged lands for the protection of wildlife within the meaning of section 6(e) of the Alaska Statehood Act (which Alaska disputes), the rights retained by the United States would at minimum not include the subsurface interests. The United States has already determined that these interests are not essential to wildlife protection purposes in northeast Alaska. Indeed, in 1983 the Department of the Interior traded 92,160 acres of subsurface oil and gas rights within the Arctic National Wildlife Refuge ("ANWR") to the Arctic Slope Regional Corporation, a for-profit Alaska Native corporation organized under the Alaska Native Claims Settlement Act,[22] and permitted the corporation to drill exploratory wells within the ANWR lands. H.R. Rep. No. 104-8, 104th Cong., 1st Sess. 35 (1995).

To accommodate both the United States' and Alaska's legitimate interests, the United States' retention of any rights to submerged lands should be limited to the minimum necessary to fulfill the purpose of the withdrawal and reservation.

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[22] Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601 *et seq.* (1996).

CONCLUSION

The Court should accept the Master's recommendation that the pre-statehood application for withdrawal and reservation of a wildlife refuge in northeast Alaska, not acted on until long after Alaska's admission to the Union and the vesting of its submerged lands entitlement, did not defeat Alaska's title to those lands.

October 1996

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